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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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JOSE (JOSEPH) TOMARGO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## QUESTION PRESENTED

Whether the United States Court of Appeals, Eleventh Circuit erred in failing to apply the circumstantial evidence rule to a reasonable hypothesis of innocence raised by the uncontroverted testimony of a witness and by physical evidence obtained by government agents.

## THE PARTIES

A list of all the parties to this proceedings in the Court where the Judgment is sought to be reviewed should include the following co-defendant in the prosecution in the United States District Court for the Southern District of Florida is LARRY CARRILLO.

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The United States Court of Appeals, Eleventh Circuit acknowledged that the circumstantial evidence rule was applicable but failed to apply the rule to a reasonable hypothesis of innocence raised by uncontroverted trial testimony, and by physical evidence seized by government agents. Thus this Honorable Court should accept jurisdiction because the United States Court of Appeals:

1. Departed from the essential and fundamental requirements of law.
2. Deprived Petitioner of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.
3. Rendered an opinion in conflict with other opinions of the Fifth and Eleventh Circuits.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

CASE NO:

JOSE (JOSEPH) TOMARGO,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

Petitioner, JOSE (JOSEPH) TOMARGO, respectfully prays that a WRIT OF CERTIORARI issue to review the judgment and opinion of the United States Court of Appeals, Eleventh Circuit entered in the case entitled UNITED STATES OF AMERICA v. JOSE (JOSEPH) TOMARGO, Case No. 80-5791 on April 9, 1982.

## OPINION BELOW

The opinion of the United States Court of Appeal, Eleventh Circuit, opinion not yet reported, appears in the Appendix hereto. (App. 1.).

## JURISDICTION

Petitioner seeks review of a final decision of the United States Court of Appeals, Eleventh Circuit rendered on April 9, 1982. Motion for Rehearing was denied May 12, 1982. This petition is filed within sixty (60) days from that date. Supreme Court Rules 20(1).

Jurisdiction is invoked pursuant to 28 U.S.C. 1254(1) which provides:

> Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree.

## CONSTITUTIONAL PROVISIONS INVOLVED

The question presented involves the Fifth Amendment to the Constitution of the United States.

## FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## STATEMENT OF THE CASE

### INTRODUCTION

Petitioner was charged in the United States District Court for the Southern District of Florida in Miami in a three count Indictment with (1) Conspiracy to violate 21 U.S.C. 841(a)(1) Prohibiting Possession with Intent to Distribute and Distribution of Methaqualone in violation of 21 U.S.C. 846; (2) Possession with Intent to Distribute Metaqualone in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2; (3) Distribution of Metaqualone in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Petitioner plead

not guilty. Petitioner's Motion for Judgment of Acquittal was denied. The jury returned a verdict of guilty on all counts. Petitioner's Motion for a New Trial asserting insufficient evidence was denied. The court sentenced Petitioner to a term of four years on each count to run concurrently. On appeal to the United States Court of Appeals, Fifth Circuit (subsequently transferred to the newly formed Eleventh Circuit), Petitioner asserted that the Court below erred in denying his Motion for Judgment of Acquittal and Motion for New Trial for the circumstantial evidence did not negate every reasonable hypothesis of innocence and thus was insufficient to support the conviction below and denied Petitioner's Motion for Rehearing on May 12, 1982.

## REASONS FOR GRANTING THE WRIT

Agent Rayner acquired information that Mr. Sheyes dealt in illegal sales of drugs and entered negotiations with Mr. Sheyes to make a purchase of drugs. The parties agreed to a transaction to occur on a certain date in a motel

in Miami, Florida. The investigation leading to the agreement had not disclosed the participation nor the existence of Petitioner. On the date of the transaction Agent Rayner called Mr. Sheyes at the motel and during the conversation heard a voice in the background which sounded as if the person spoke in a latin accent. There was no evidence produced at the trial that Mr. Tomargo spoke in a latin accent. Agent Rayner, later in the day, proceeded to the motel to complete the transaction. As he approached the door to the room occupied by Mr. Sheyes, two men, Mr. Carrillo and Mr. Sanchez approached. Mr. Sheyes admitted all three. Mr. Carrillo carried a package containing tablets of drugs. He placed them on a table next to a quantity of drugs. A third person was in the room. Mr. Sheyes introduced him as "Joe". This person was the Petitioner. Mr. Sheyes had referred to his supplier as "Joe". The transaction was discussed. During the conversation, Petitioner stated that there was a total of 36,000 qualude tablets and 32,000

were outside. Agent Rayner left the room, ostensibly to get the purchase money, returned with other agents and arrested all parties. Mr. Carrillo testified that he and the Petitioner had arranged for a sale of jewelry and government agents found jewelry in Petitioner's automobile.

The United States Court of Appeals in its opinion cited United States v. Spradlen, 662 F.2d 724, 727 (11th Cir. 1981) for the proposition that when reviewing the sufficiency of the evidence, the standard of review is whether in the light most favorable to the government, the jury could conclude that the evidence is inconsistent with every reasonable hypothesis of the Defendant's innocence.

This is a correct statement of the law. In the instant case, the United States Court of Appeals listed the essential elements of the crimes charged in the three counts and referred to testimony and evidence indicating that the elements were satisfied. The opinion made no reference to the fact that Mr. Carrillo testified that he and Petitioner has arranged a sale

of jewelry. This testimony was not controverted. The opinion made no mention that agents testified that during a search of Petitioner's car that they found jewelry. Thus the evidence raised the reasonable hypothesis that Petitioner was present not as part of the conspiracy to sell drugs, but for the entirely legitimate purpose of selling jewelry to Mr. Carrillo.

The United States Court of Appeals correctly acknowledge that the circumstantial evidence rule is applicable. However, the United States Court of Appeals failed to apply the rule to the reasonable hypothesis of innocence raised by the testimony of Mr. Carrillo and the evidence found by the agents in Petitioner's automobile. In fact, the United States Court of Appeals failed to acknowledge or recognize that a reasonable hypothesis of innocence was raised by the testimony and evidence.

The circumstantial evidence rule and its application is mandated by the Fifth Amendment to the Constitution of the United States. The purpose of the rule is to insure that guilt in

a criminal case is proven beyond a reasonable doubt. This degree of proof is required by the due process of the Fifth Amendment, In re Winship, 397 U.S. 358, 90 S.Ct. 1063, 25 L.Ed. 2d 368 (1970).

Thus in failing to apply the rule, the United States Court of Appeals departed from the essential and fundamental requirements of law and denied Petitioner due process of law.

Further, where the United States Court of Appeals recognized that the circumstantial evidence rule was applicable but failed to consider its impact where a reasonable hypothesis of innocence was raised by the testimony and evidence, the decision is in conflict with other decisions in the Fifth and Eleventh Circuits. United States v. Spradlen, supra; United States v. Malatesta, 590 F.2d 1379, 1382 (5th Cir.) (en banc) cert. denied 440 U.S. 962, 99 S.Ct. 1508, 59 L.Ed.2d 777 (1979); Montoya v. United States, 402 F.2d 847, 850, (5th Cir. 1968).

This Honorable Court should issue a Writ of Certiorari because the United States Court of

Appeals:

1. Departed from the essential and fundamental requirements of law.

2. Denied Petitioner due process of law.

3. Rendered an opinion in conflict with other opinions in the Fifth and Eleventh Circuits.

## CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review judgment and opinion of the United States Court of Appeals, Eleventh Circuit. The decision of the United States Court of Appeals should be reversed and the Petitioner discharged pursuant to Green v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed. 2d 15 (1978); Burke v. United States, 437 U.S. 1, 98 S.Ct. 2141, 37 L.Ed.2d 1 (1978).

Respectfully submitted,

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BY: Philip Carlton, Jr.
PHILIP CARLTON, JR. JR

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the Petition for Writ of Certiorari was mailed first class, postage prepaid to the Solicitor General, Department of Justice, Washington, D.C., 20530. I further certify that all parties required to be served have been served this 30th day of July, 1982.

Philip Carlton, Jr.

PHILIP CARLTON, JR.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

CASE NO:

JOSE (JOSEPH) TOMARGO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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APPENDIX

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1. Copy of Opinion of Eleventh Circuit.

2. Copy of Order denying Motion for Rehearing.

UNITED STATES v. TAMARGO

UNITED STATES of America,

Plaintiff-Appellee,

v.

JOSE (Joseph) TAMARGO and
Larry CARRILLO,

Defendants-Appellants.

No. 80-5791.

United States Court of Appeals,
Eleventh Circuit

April 9, 1982.

Defendants were convicted of possession of methaqualone with intent to distribute, distribution, and conspiracy, and appealed from the United States District Court for the Southern District of Florida at Miami, Sidney M. Aronovitz, J. The Court of Appeals, Clark, Circuit Judge, held that: (1) evidence was sufficient to support convictions for conspiracy to possess with intent to distribute; (2) evidence was sufficient to support conviction for possession with intent to distribute in the case of each defendant; and (3) fact

that attempted transfer of controlled substance is thwarted by defendant's arrest does not preclude finding of distribution.

Affirmed.

Appeals from the United States District Court for the Southern District of Florida.

Before FAY, ANDERSON and CLARK, Circuit Judges.

CLARK, Circuit Judge:

The appellants, Jose Tamargo and Larry Carrillo, were charged jointly in a three count indictment with (1) conspiracy to possess with intent to distribute methaqualone, a Schedule II nonnarcotic controlled substance, in violation of 21 U.S.C. §846 (2) possession with intent to distribute methaqualone in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2, and (3) distribution of methaqualone in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. §2. Both appellants were convicted by a jury on all three counts, and this appeal followed. The appellants claim that the trial court erred by denying their motions for judgment

of acquittal on all three counts because the evidence was insufficient to support their convictions. We affirm.

"When reviewing the sufficiency of the evidence supporting a criminal conviction, the standard of review is whether, viewing the evidence and all reasonable inferences derived therefrom in the light most favorable to the government, the jury could conclude that the evidence is inconsistent with every reasonable hypothesis of the defendant's innocence....This standard of review applies to any criminal conviction, including one for conspiracy." United States v. Spradlen, 662 F.2d 724, 727 (11th Cir.1981) (citations omitted).

The facts, viewing the evidence in the light most favorable to the government are as follows. Gordon Rayner, an agent of the Drug Enforcement Administration (DEA), had a meeting with Harold Sheys in Brunswick, Georgia, on March 13, 1980, at which time Agent Rayner was using the undercover name Joe Garner. At this meeting, Rayner and

and Sheys negotiated for the sale of a large quantity of methaqualone tablets. Sheys told Rayner that he could obtain methaqualone tablets from a source in Miami, Florida, area who desired to deal in quantities of 100,000 or more.

Agent Rayner and Sheys met again on March 18, 1980, in a room at a Holiday Inn in Miami to conduct further negotiations for the delivery of methaqualone tablets. Sheys told Rayner during this meeting that his supplier's name was "Joe."

On March 31, 1980, Agent Rayner telephoned Sheys, who was in room 118 at the Airline Hotel in Miami. Sheys told Rayner that he had the methaqualone tablets with him and that the deal was all set. In a subsequent telephone conversation on the same day, Sheys told Rayner that his methaqualone supplier was with him at room 118. During this conversation, Agent Rayner, who has a Spanish language background and who had served in Miami and Latin America for four years, heard another voice in Sheys'

room—that of a male individual with a "latin accent."

At about 5:45 p.m. on March 31, 1980, Agent Rayner met Sheys in room 118. Sheys told Rayner that his supplier, "Joe," had gone to pick up 50,000 methaqualone tablets. Rayner and Sheys discussed the price of the methaqualone, and Rayner eventually agreed to pay $1.25 per tablet. Rayner then left to make arrangements concerning the money. At about 9:30 p.m., Rayner telephoned Sheys and was told to return to room 118 because the deal was ready to be made.

Agent Rayner arrived back at the motel at about 10:05 p.m. He entered the motel from the south side and was proceeding toward room 118 when he observed two Latin males coming through the north entrance. Rayner and the two men arrived at room 118 simultaneously. One of the Latin males was appellant Carrillo, who was carrying some kind of lump or package covered by a shirt. Carrillo's companion was named Jesus Sanchez.

When Sheys answered the door, he told Rayner with reference to the two Latin males, "That is all right. They are here with the stuff." Rayner and the two men entered room 118 which already was occupied by another man in addition to Sheys. Sheys introduced this man to Rayner as "Joe." Rayner identified "Joe" as appellant Jose Tamargo.

Rayner observed a clear plastic bag containing numerous white tablets sitting on a dresser in room 118. Carrillo placed another clear plastic bag, which was the package that Rayner had observed him carrying, on the dresser next to the first plastic bag. Tamargo, Carrillo, Sheys, Sanchez, and Rayner all then discussed the delivery of the methaqualone tablets and the quantity available.

Appellant Tamargo told Rayner that 36,000 methaqualone tablets were available, 32,000 of which were in a car in the motel parking lot. Appellant Carrillo stated that he had 12,000 more methaqualone tablets. An

agreement was reached by which Rayner would pay $1.25 per tablet for 36,000 tablets, bringing the total purchase price to $45,000.

Rayner then left room 118, ostensibly to get the money. He returned shortly with Agent Segarra, and they arrested Sheys, Tamargo, and Carrillo (Sanchez already had departed). In addition the two clear plastic bags on the dresser were seized. Subsequent examination revealed that each bag contained 2,000 methaqualone tablets.

Rayner left the room, went out to the motel parking lot, and told the other agents what had happened. Sanchez, Garcia (another co-defendant not tried with the appellants), and an agent were standing by the car in which Carrillo had arrived with the plastic bag full of methaqualone tablets. A search of the car revealed several similar plastic bags containing methaqualone tablets.

[1,2] Appellants first contend that the evidence is insufficient to support their convictions for conspiracy

to possess with intent to distribute methaqualone. The essential element of a drug conspiracy under 21 U.S.C. §846 is an agreement by two or more persons to violate the narcotics laws. United States v. Spradlen, 662 F.2d 724, 727 (11th Cir. 1981). The existence of such an agreement may be proved by circumstantial evidence, such as "inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme." Id. Proof is not required that the defendant had knowledge of all the details of the conspiracy; the defendant need only have knowledge of the essential objective of the conspiracy. United States v. Alvarez, 625 F.2d 1196, 1198 (5th Cir. 1980)(en banc), cert. denied, 451 U.S. 938, 101 S.Ct. 2017, 68 L.Ed.2d 324 (1981). The defendant may be found guilty of conspiracy even if he did not join the conspiracy until after its inception, United States v. Robertson, 659 F.2d 652,

656, (5th Cir. 1981), and even if he plays only a minor role in the total scheme, United States v. Alvarez, 625 F.2d at 1198.

[3] The evidence in this case establishes beyond a reasonable doubt that a conspiracy existed to possess methaqualone with intent to distribute. Furthermore, the jury reasonably could have concluded that both appellants knew of the conspiracy and voluntarily participated in it. First, the appellants were present in room 118 when the final negotiations for the sale of the methaqualone tablets occurred. Although mere presence is not enough to establish participation in a conspiracy, United States v. Spradlen, 662 F.2d at 727, the evidence shows much more. Appellant Carrillo arrived at room 118 with a plastic bag of methaqualone tablets in his possession. Both of the appellants took part in discussions concerning the delivery of the methaqualone tablets and the quantity available. Appellant Tamargo told Agent Rayner that 36,000 methaqualone tablets

were available, 32,000 of which were in a car in the motel parking lot. Appellant Carrillo told Agent Rayner that he had 12,000 more methaqualone tablets. A search of the car in which Carrillo had arrived at the motel revealed several plastic bags containing numerous methaqualone tablets. We hold that this evidence was sufficient for the jury to conclude that the appellants were knowing, voluntary participants in a conspiracy to possess methaqualone with the intent to distribute.

[4] Appellants' second contention is that the evidence was insufficient to support their convictions for possession with intent to distribute methaqualone. Dealing first with appellant Carrillo, the evidence shows that he arrived at room 118 with a clear plastic bag containing 2,000 methaqualone tablets in his possession. Carrillo thus indisputably was in possession of methaqualone, leaving only the question whether the evidence was sufficient to support the conclusion that he intended to distribute

it. Intent to distribute a controlled substance may be inferred from the quantity involved. United States v. Grayson, 625 F.2d 66 (5th Cir. 1980). The jury reasonably could have inferred that one in possession of 2,000 methaqualone tablets intended to distribute the tablets rather than use them for personal consumption. Thus, the evidence was sufficient to support Carrillo's conviction for possession with intent to distribute methaqualone.

[5,6] As for appellant Tamargo, the evidence is also sufficient to support his conviction for possession with intent to distribute methaqualone. Possession of a controlled substance may be actual or constructive. United States v. Moreno, 649 F.2d 309 (5th Cir. 1981). Moreover, as with actual possession, constructive possession of a controlled substance may be exclusive or joint and may be proved by circumstantial as well as direct evidence. Id. Appellant Tamargo was a

participant in a conspiracy to possess methaqualone with intent to distribute, and the evidence shows beyond any doubt that some participants in this conspiracy possessed methaqualone with the intent to distribute. Therefore, Tamargo, as a co-conspirator, is considered also to have possessed methaqualone with the intent to distribute. United States v. Garcia, 655 F.2d 59, 63 (5th Cir. 1981).

[7] Appellants' final contention is that the evidence was insufficient to support their convictions for distribution of methaqualone. "The term 'distribute' means to deliver... a controlled substance." 21 U.S.C. §802(11). "The constructive, or attempted transfer of a controlled substance...." 21 U.S.C. §802(8)(emphasis added). The statutory scheme clearly defines "distribution" as a delivery, and "delivery" can be merely an attempted transfer.

[8] Although no actual transfer of methaqualone occurred in this case,

the evidence beyond a reasonable doubt supports the conclusion that appellants attempted to transfer methaqualone, and this is all that the statute requires for conviction. The argument that no distribution occurs where an attempted transfer is thwarted by the defendants' arrest was squarely rejected in United States v. Oropeza, 564 U.S. 1080, 98 S.Ct. 1276, 55 L.Ed.2d 788 (1978), and we reject it here as well. We hold that the evidence was sufficient to support appellants' convictions for distribution of methaqualone.

For the reasons expressed in this opinion, the appellants' convictions on all three counts are

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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NO. 80-5791

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE (JOSEPH) TAMARGO and
LARRY CARRILLO,

Defendants-Appellants.

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Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING

( MAY 12 1982 )

Before FAY, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/

United States Circuit Judge